

1995

Sheree Hewett v. D&S Corporation dba Intermountain Printing/Type Tech : Reply Brief

Utah Court of Appeals

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Timothy W. Blackburn; Van Cott, Bagley, Cornwall and McCarthy; Attorney for Plaintiff/ Appellee.
Robert A. Echard; Robert A. Echard and Associates; Attorney for Defendant/Appellant.

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT

IN THE UTAH COURT OF APPEALS

SHEREE HEWETT,)	.A10
)	DOCKET NO. _____
Plaintiff/Appellee,)	
vs.)	
)	
D&S CORPORATION dba,)	
INTERMOUNTAIN PRINTING/)	No. 950347-CA
TYPE TECH,)	
)	Priority - 15
Defendant/Appellant.)	

REPLY BRIEF

Appeal from Second Judicial District Court
of Weber County, State of Utah
The Honorable Michael D. Lyon, District Court Judge

ROBERT A. ECHARD (#953)
ROBERT A. ECHARD & ASSOCIATES
Attorney for Defendant/Appellant
Key Bank Building Suite 200
2491 Washington Blvd.
Ogden, UT 84401
Telephone: 801-393-2300

TIMOTHY W. BLACKBURN
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorney for Plaintiff/Appellee
2404 Washington Blvd., #900
Ogden, UT 84401
Telephone: 801-394-5783

FILED

SEP 20 1995

COURT OF APPEALS

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Attorney for Defendant/Appellant
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2491 Washington Blvd.
Ogden, UT 84401
Telephone: 801-393-2300

TIMOTHY W. BLACKBURN
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorney for Plaintiff/Appellee
2404 Washington Blvd., #900
Ogden, UT 84401
Telephone: 801-394-5783

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ARGUMENT

POINT I

MARSHALLING OF EVIDENCE.

Hewett, in her brief, claims that Intermountain did not properly marshall the evidence in favor of Hewett. Intermountain believed that it did so marshall the evidence, however, to clarify that issue, Intermountain believes the evidence produced in favor of Hewett is as follows.

The only testimony produced on behalf of Hewett was the testimony of Hewett, Dana Hales and James Hines. Dana Hales was a real estate agent who was a friend of Hewett's and James Hines was the individual who leased the property from Hewett for \$600.00 per month. Hewett, in her testimony, acknowledged that the lease agreement, which she had entered into with Intermountain required her to maintain the exterior portions of the building. () She introduced into evidence the notification, marked as Plaintiff's Exhibit 2; the letter from Dave Thomas, dated September 14, 1993, marked as Plaintiff's Exhibit 3; the letter addressed from Hewett to Dave Thomas, dated September 15, 1993, marked as Plaintiff's Exhibit 4; the letter from Hewett to Dave Thomas, dated October 5, 1993, marked as

Plaintiff's Exhibit 5; the letters from Hewett's attorney Timothy Blackburn to Dave Thomas, one dated November 5, 1993 and the other dated November 30, 1993, marked as Plaintiff's Exhibits 6 and 7. Hewett's testimony can be generally described as a denial of any knowledge of any structural problems and a denial that she had any obligation to correct any structural problems. Hewett stated that she received a copy of Plaintiff's Exhibit 2 and was horrified when she read the things contained therein. In approximately November, 1993 she went into the building, observed its condition, at which time she observed that the building was dirty, there was a broken piece of glass, she observed stains on the floor, which was white and chalky, the floor tile was scratched, electrical wires were pulled out and she observed a tile at the front of the entrance that was hard. She found that the cooling system was full of dirt and she had an employee wash it out with a hose. (T. 77-78). She found a crack in the foundation, but did not find any broken windows. (T. 78). Hewett acknowledged that rent was paid through December, 1993. (T. 83). She also acknowledged that she did not do any work to repair the roof and did not have a roofer look at the roof. (T. 84, 119). She also stated that when she examined the building, " . . . we went on the leaking roof, I walked everywhere." (T. 74, line

24). Hewett testified that she did not actually see any water inside the building, but that she had been shown by her attorney, Timothy Blackburn, where the apparent leak was. (T. 94-95). Hewett acknowledges that her attorney, Blackburn, in his March 28, 1994 letter, stated that he observed two (2) small roof leaks and evidence of a roof leak in the overhang. Hewett stated, however, that she did not believe that she had any responsibility and that she did not feel the roof leaked. (T. 113, 114, 110). Hewett also testified that she did not know what the overhang was and that all she knew about was inside the building. (T. 118). When asked whether Hewett had constructed a small concrete or cinder block wall about a foot and one-half in height behind the building, she stated that she did not know. She also stated that she did not know that the ground sloped towards the foundation of the building. (T. 122). She stated that she did not perform any repairs inside of the building. (T. 127).

Dana Hales was a real estate broker and a friend of Hewett's. He often frequented the Maple Gardens which was operated by Hewett next door to the building. When he looked at the property, he did a walk through. He testified that the walk through was secondary to him being at the Maple Gardens to eat. He stated, "You know, here again, it was not a situation to go

down there to inspect the building. I went to eat. And had a key and just casually walked across the parking lot to take a look." (T. 38-39). Hales did not, at any time, have a professional look at the building. (T. 39). He stated that he did not notice any damage to the building and that he was talking about internal damage. (T. 41). He was told by Hewett that the tenant was complaining about water from the ceiling and water on the floor. (T. 39).

James Hines leased the building from Hewett and is the current tenant. He testified that he did not do any structural repairs to the building. (T.55). He testified that when he entered the building it was basically dirty, that a lot of wires were pulled out and exposed, but he did not see any broken glass and he did not observe any tiles coming off the floors. He did not observe a crack in the foundation, nor leaking through the roof or pooling of water on the floor. He testified that all of the furnace, air conditioner and other equipment were in working condition. (T.55-56). He testified that he did notice paint loose on the exterior overhang of the building. (T. 59). He testified that the amount he paid for leasing the property was reduced to cover \$15,000.00 worth of costs which he anticipated spending to remodel the building for his particular use of the

building. He testified that no one had told him that the roof had been leaking before the property was shown to him. (T. 60).

The general substance of the testimony of Hewett's witnesses is that said individuals did not see water leaking and that no structural repairs were made on the building. There was no explanation for the improvements that had obviously been made on the property consisting of a repair in part of the overhand on the exterior part of the building and the retaining wall that had been placed behind the building, which was obviously for the purpose of keeping water from rolling down and coming in the bottom of the foundation. (See Statement of Facts, paragraph 28 of Appellant's Brief). Likewise there was no explanation for the fact that Hewett's attorney had acknowledged that there were leaks in the roof and Hewett and her attorney had promised, in the written documentation, that the repairs would be made when the rent was brought current.

As pointed out in the Intermountain's brief, there was substantial evidence demonstrating that there were water problems and other structural problems which were the responsibility of Hewett to repair. It should be noted that Judge Lyon did not make findings as to the credibility of the various witnesses and he acknowledged in his comments in the transcripts that there

were leaks. The Court's attention is directed to the Statement of Facts and Arguments contained in Intermountain's original brief which set out significant evidence of structural difficulties that were the responsibility of Hewett and the repeated promises of Hewett to repair those problems.

In her brief, Hewett claims that Thomas insisted that Hewett was responsible for the repair of all of the items listed on Plaintiff's Exhibit 2. That claim, however, is not correct. Thomas testified that when he spoke to Hewett's attorney Blackburn he stated, "Well, I told him that the building structure was his client's responsibility. I felt the leaking roof and the leakage of the windows and the dirt coming in, the tiles curling up. The cooling system never became an issue. We didn't get that far." Hewett also claims that Hewett was not given adequate notice concerning the structural problems. An examination of the Exhibits will clearly demonstrate that Hewett received repeated notice of the difficulties. The Court's attention is also directed to the Statement of Facts contained in Intermountain's brief as to the notification and knowledge possessed by Hewett.

It is the position of Intermountain that the testimony presented by Hewett and her witnesses was to the effect that they

did not observe water leaking and therefore did not attempt to have the roof examined to see what caused the obvious marks of water leakage and damage and did not perform any work on the property. This testimony should not be permitted to out weigh the specific testimony given by Intermountain and its witnesses to the effect that the problems existed and that Hewett's attorney had acknowledged that the problems existed.

Intermountain believes that it has adequately marshalled the evidence most favorable to Hewett and that evidence is scant and non compelling. Consequently, Intermountain requests that the Court grant the relief sought by Intermountain in its brief.

POINT II

THE CITATION OF THE APPELLEE TO THE RECORD IS INCORRECT.

Hewett in her memorandum makes a number of citations to the records which are not accurate. Intermountain did not check all of the notes, but some of them which touch on more sensitive issues were checked. On page four (4) of the Hewett's brief, the first paragraph, Hewett contends that Thomas could not explain why no water had been seen in the building. Pages 235 and 275 of the transcript are cited for this statement. Neither of those pages contain any testimony relative to this issue. Page 239 of the transcript is also cited. Thomas, on page 239 of the

transcript, testified that he did not observed any water coming in through the roof, not that he did not observe water in the building.

Hewett also cites arguments made by counsel rather than testimony given during the course of the trial. On the top of page 8, Hewett cites page 318 of the transcript, which is a closing argument of Hewett's attorney, Timothy Blackburn; on page 11 in the last paragraph, Hewett cites pages 289 and 288 of the transcript, both of which contain arguments made by Mr. Blackburn; and on page 12 the third paragraph Hewett cites to page 338 of the transcript, which is Blackburn's argument. All of these citations are inappropriate and do not cite evidence that was presented during the course of the trial by witnesses.

On page 8 of the Hewett's brief, the second paragraph, Hewett cites page 192 of the transcript for the fact that Charlesworth did not notice any water problems in the building between March and August of 1993. No such testimony is contained on page 192. On page 9 of the Hewett's brief, in the second paragraph, pages 181, 184, and 211 of the transcript are cited as supportive testimony by Hewett. Page 181 and 184 contains the testimony of Howell and page 211 contains the testimony of Charlesworth. On page 10 of the Hewett's brief in the second

paragraph, Hewett cites page 225 of the transcript as testimony of Charlesworth that the leaking on the overhang on the exterior of the building " . . .does not effect the usability of the building." In fact, Charlesworth did not makes such a statement. Charlesworth was specifically asked if the leaking in the overhang affected the use of the inside of the building and he said no. He did not testify that it did not effect the usability of the building. In paragraph four (4) of the same page; Hewett cites pages 119 through 120 of the transcript for the proposition that Hewett spoke with a roofer. Those pages of the transcript do contain a statement by her that she spoke to a roofer, however, Hewett is giving a wrong impression to the Court. On those same pages, Hewett states that she did not have a roofer look at the building.

On page 12 of the Hewett's brief, in the third paragraph, Hewett cites page 188 of the transcript for the proposition that "the interior problems of the building were no problem for the right kind of tenant." Page 188 contains the testimony of Charlesworth. A reference to page 187 and 188 will demonstrate that Charlesworth was talking about the condition of the building when it was originally leased to Thomas, not the condition of the building after Thomas had vacated it. As previously pointed out,

this same sentence is supported by a citation to page 338 of the transcript, which is the argument of Hewett's attorney, Timothy Blackburn.

It is the position of Intermountain that Hewett has not accurately reported to the Court the testimony as reflected by the transcript and therefore the Appellant Court should not assume that Hewett has correctly stated the facts as presented in the lower Court.

POINT III

ATTORNEY'S FEES.

The lower Court rule that pursuant to the lease Hewett was entitled to attorney's fees. The terms of the contract pertaining to attorney's fees are reciprocal. (Plaintiff's Exhibit 1). Consequently, if this Court reverses the lower Court's decision, it should refer the matter back to the trial court to determine the amount of attorney's fees to be awarded to the Defendant at the trial level and on appeal.

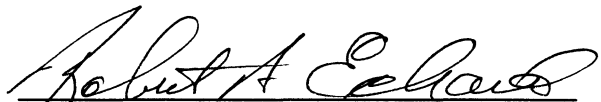
CONCLUSION

The marshalling of the evidence most favorable to Hewett results in the conclusion that Hewett received notification of the problems complained of by Intermountain, made promises that

those problems would be repaired, but in fact, did not have the building inspected by a professional nor make any repairs. Hewett denied seeing any water leaking in the building personally and therefore concluded that there was no leak. This in spite of the evidence pointed out to Hewett's attorney and observed by the other witnesses who testified in this case. The evidence produced by Intermountain and its witnesses clearly demonstrates that there were existing water problems and that those water problems impacted the ability of Intermountain to release the property.

Hewett in her brief incorrectly cites to the record thereby rising questions about the accuracy of the evidence relied upon by Hewett in her argument. In the event this Court grants the relief sought by Intermountain, then Intermountain is entitled to be awarded attorney's fees and the matter should be referred back to District Court to determine the reasonable attorney's fees incurred at the time of trial and upon appeal.

RESPECTFULLY submitted this 15 day of September, 1995.

A handwritten signature in cursive script, reading "Robert A. Echard". The signature is written in dark ink and is positioned above the printed name and title.

ROBERT A. ECHARD


Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that I caused to be mailed four (4) true and correct copy of the foregoing document, postage prepaid, to the following individuals:

Timothy W. Blackburn
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Attorney for Plaintiff/Appellee
2404 Washington Blvd., #900
Ogden, UT 84401

DATED September 18, 1995.


ROBERT A. ECHARD
Attorney for Defendant/Appellant